

APPEAL NO. 101397-s
FILED NOVEMBER 22, 2010

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 31, 2010. The hearing officer determined that the respondent (claimant) had reasonable grounds for his failure to meet the supplemental income benefits (SIBs) criteria set forth in 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) and that the claimant is entitled to SIBs for the fourth quarter.

The appellant (carrier) appealed, contending that the hearing officer erred in applying Rule 130.102(d)(2) to the facts of this case and requests that the hearing officer's decision be reversed. The claimant responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties agreed that the qualifying period for the fourth quarter was from January 20 through April 22, 2010. The hearing officer made the following unappealed findings of fact:

7. As a result of his compensable injury of _____, [c]laimant has a whole body [i]mpairment [r]ating equal to or greater than [15%].
8. Claimant did not elect to commute any portion of the [i]mpairment [i]ncome [b]enefits payable to him on account of his compensable injury of _____.
9. During the qualifying period preceding the fourth [SIBs] quarter, [c]laimant did not return to work earning at least [80%] of the wage he earned prior to _____.
10. Claimant's unemployment during the qualifying period preceding the fourth [SIBs] quarter was a direct result of the impairment attributable to his compensable injury of _____.
11. During the qualifying period preceding the fourth [SIBs] quarter, [c]laimant was not actively participating in a vocational rehabilitation program [(VRP)].
12. During the qualifying period preceding the fourth [SIBs] quarter, [c]laimant was not actively participating in work search efforts conducted through the Texas Workforce Commission [(TWC)].

13. Claimant did not make job applications or job contacts during any week of the qualifying period preceding the fourth [SIBs] quarter.
14. Claimant was not totally unable to work in any capacity during any week of the qualifying period preceding the fourth [SIBs] quarter.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Rule 130.101(4) provides in part, that a qualifying period that begins on or after July 1, 2009, is subject to Rules 130.100-130.109 effective July 1, 2009.

Rule 130.102(d)(1) provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

- (A) has returned to work in a position which is commensurate with the injured employee's ability to work;
 - (B) has actively participated in a [VRP] as defined in Rule 130.101 of this title (relating to definitions);
 - (C) has actively participated in work search efforts conducted through the [TWC];
 - (D) has performed active work search efforts documented by job applications; or
 - (E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.
- (2) An injured employee who has not met at least one of the work search requirements in any week during the qualifying period is not entitled to SIBs unless the injured employee can demonstrate that he or she had reasonable grounds for failing to comply with the work search requirements under this section.

The claimant's theory of entitlement for SIBs for the fourth quarter was generally a combination of total inability to work (Rule 130.102(d)(1)(E)) or active participation in a VRP conducted by the Department of Assistive and Rehabilitative Services (Rule 130.102(d)(1)(B)). As the hearing officer's unappealed findings indicate, the claimant, in this case, does not qualify under either of those provisions.

The hearing officer, in the Discussion portion of her decision comments:

Under the [Texas Department of Insurance, Division of Workers' Compensation's] prior [SIBs] Rules, the analysis of [c]laimant's situation would end, and it would be determined that [c]laimant is not entitled to receive the benefits sought herein. Rule 130.102(d)(2), however, now permits a claimant to show that despite a failure to satisfy the requirements of Rule 130.102(1), the claimant nonetheless may receive [SIBs] if he can demonstrate reasonable grounds for such failure. In this case, [c]laimant's medical records and credible testimony indicate that during the applicable qualifying period, he was undergoing therapy to assist him in his recuperation from a revision of his multi-level cervical fusion surgery. Claimant's involvement in post-surgical rehabilitation during the vast majority of the fourth quarter qualifying period is a reasonable ground for his failure to pursue the types of work search activities enumerated elsewhere in the Rule in question, and it will therefore be decided that [c]laimant is entitled to [SIBs] for the fourth quarter.

The medical evidence indicates that the claimant had a second cervical surgery on November 20, 2009. As the hearing officer states, the medical records and the claimant's testimony indicate that the claimant was receiving physical therapy (PT) as well as a pain management program during the qualifying period. A consultation note dated January 7, 2010, states that the claimant is attending three therapy sessions a week. Another medical record dated January 18, 2010, just prior to the fourth quarter qualifying period, would indicate that the claimant was in PT for an hour that day. A report from (Dr. F) dated January 28, 2010, recommended "four more weeks of [PT]." Records dated March 5, 9, and 11, 2010, indicate that the claimant was in PT 75 minutes each session. The claimant testified that the PT after the surgery was not an "all day appointment" but that he began all day (8:00 a.m. to 5:00 p.m. with an hour for lunch) appointments "in March 2010." The all day pain management program the claimant was enrolled in did not cover the entire qualifying period and based on the claimant's testimony was only for the last few weeks of the qualifying period.

The hearing officer correctly finds that the claimant does not qualify for SIBs based on the criteria outlined in Rule 130.102(d)(1) and specifically the total inability to work (Rule 130.102(d)(1)(E)). However, the hearing officer based her determination that the claimant was entitled to SIBs based on the fact that he had reasonable grounds for failure to meet the SIBs criteria set forth in Rule 130.102(d). The hearing officer based her determination that the claimant had reasonable grounds for failure to meet the SIBs criteria set forth in Rule 130.102(d) on his participation in the post-surgery PT and/or the pain management program. As previously discussed, the claimant's pain management program did not encompass the entire qualifying period of the fourth quarter. Additionally, for many of the weeks the claimant attended PT it was only for 75-minute sessions.

Rule 130.102 provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the specified work search requirements each week during the entire qualifying period. The preamble to Rule 130.102 stated “[s]ubsection (d)(1) is also amended to add ‘each week’ before ‘during’ and ‘entire’ before ‘qualifying period’ to clarify that the injured employee’s work search efforts were to continue each week during the entire qualifying period.” (34 Tex. Reg. 2140, 2009). The preamble further states, that Rule 130.102(d)(4) was added to confirm that hearing officers would continue to retain discretion in determining if an injured employee had demonstrated reasonable grounds for failure to meet at least one of the work search requirements in this section during any week during the qualifying period. In the instant case, there was no evidence that the claimant attended PT or a pain management program each week of the qualifying period. The hearing officer acknowledges that the claimant’s post-surgical rehabilitation was during “the vast majority of the fourth quarter qualifying period.” The claimant testified that he was receiving PT eight hours a day beginning in “mid March.” The claimant presented no evidence of any active work search efforts or compliance with the work search efforts in Rule 130.102(d)(1)(A-E). The “reasonable grounds for failing to comply with the work search requirements” in Rule 130.102(d)(2) does not create a catch-all for individuals who cannot otherwise establish compliance with Rule 130.102(d)(1) during the entire qualifying period.

We hold that the hearing officer erred in applying Rule 130.102(d)(2) to the facts of this case. Accordingly, the hearing officer’s decision that the claimant is entitled to SIBs for the fourth quarter is reversed. We render a new decision that the claimant is not entitled to SIBs for the fourth quarter.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge